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In The
Supreme Court of the United States

OCTOBER TERM 2008

IN RE

LIEUTENANT COLONEL
THOMAS MOSES JOHNSON, III

ON PETITION FOR A WRIT OF MANDAMUS AND/OR
WRIT OF PROHIBITION TO THE SUPREME COURT
OF THE STATE OF HAWAII AND COURT APPOINTED
FORECLOSURE COMMISSIONER PABLO P. QUIBAN

**PETITION FOR WRIT OF MANDAMUS
AND/OR WRIT OF PROHIBITION**

GARY VICTOR DUBIN
Counsel of Record

LONG H. VU
FREDERICK J. ARENSMEYER
DUBIN LAW OFFICES
55 Merchant Street, Suite 3100
Honolulu, Hawaii 96813
Telephone: (808) 537-2300
Facsimile: (808) 523-7733
E-Mail: gdubin@dubinlaw.net

Attorneys for Petitioner

QUESTION PRESENTED

Do state courts have a duty pursuant to the Servicemembers Civil Relief Act of 2003, Congressional War Powers, and the Supremacy Clause to stay foreclosure proceedings where the debt originated prior to a servicemember's current active duty, unless otherwise finding that the military service has not materially affected his or her ability to pay, notwithstanding that the debt originated during a previous period of completed service with a different military branch?

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PETITION FOR A WRIT OF MANDAMUS AND/OR PROHIBITION

Petitioner Lieutenant Colonel Thomas Moses Johnson, III hereby seeks from this Court a writ of mandamus and/or prohibition, requiring the Hawaii Supreme Court to stay enforcement of all proceedings in the foreclosure action below as required under Section 533 of Title 50 Appendix to the United States Code and the Supremacy Clause of Article VI of the United States Constitution, and prohibiting the state court-appointed foreclosure commissioner Pablo P. Quiban from transferring the titles to Petitioner's properties.

OPINIONS AND ORDERS BELOW

The underlying orders and judgments requiring the filing of this Petition are set forth in the Appendix.

Upon granting this Petition, the Court is respectfully requested to summons for its review, in conjunction with the consideration of this Case, the entire record below in Hawaii Supreme Court Case Number 29317 and Civil Number 07-1-1893.

JURISDICTIONAL STATEMENT

Due to exceptional, irreparable circumstances and the unavailability of adequate relief in any other form or in any other court, this Court, in aid of its appellate jurisdiction, has the sole power to review the proceedings below, including the Hawaii Supreme Court's dispositive collateral order entered January 30, 2009, and to grant this Petition pursuant to Section I of Article III of the United States Constitution, Section 1651(a) of Title 28 of the United States Code, and Supreme Court Rule 20.

CONSTITUTIONAL PROVISION AND FEDERAL STATUTE INVOLVED

The Supremacy Clause of Article VI of the United States Constitution provides as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The federal statute involved, Section 533 of Title 50 Appendix to the United States Code, provides as follows:

(a) Mortgage as security

This section applies only to an obligation on real or personal property owned by a servicemember that--

(1) originated before the period of the servicemember's military service and for which the servicemember is still obligated; and

(2) is secured by a mortgage, trust deed, or other security in the nature of a mortgage.

(b) Stay of proceedings and adjustment of obligation

In an action filed during, or within 9 months after, a servicemember's period of military service to enforce an obligation described in subsection (a), the court may after a hearing and on its

own motion and shall upon application by a servicemember when the servicemember's ability to comply with the obligation is materially affected by military service--

- (1) stay the proceedings for a period of time as justice and equity require, or
- (2) adjust the obligation to preserve the interests of all parties.

(c) Sale or foreclosure

A sale, foreclosure, or seizure of property for a breach of an obligation described in subsection (a) shall not be valid if made during, or within 9 months after, the period of the servicemember's military service except-

- (1) upon a court order granted before such sale, foreclosure, or seizure with a return made and approved by the court; or
- (2) if made pursuant to an agreement as provided in section 107 [section 517 of this Appendix].

(d) Penalties

(1) Misdemeanor

A person who knowingly makes or causes to be made a sale, foreclosure, or seizure of property that is prohibited by subsection (c), or who knowingly attempts to do so, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.

(2) preservation of other remedies

The remedies and rights provided under this section are in addition to and do not preclude any remedy for wrongful conversion otherwise available under law to the person claiming relief under this section, including consequential and punitive damages.

STATEMENT OF THE CASE

A. Introduction

This Petition presents a question of first impression and national importance potentially affecting millions of United States servicemembers worldwide as to whether the Hawaii state courts committed manifest error by entering and upholding summary judgments in a foreclosure action brought against an active duty servicemember, and failing to issue a stay of action in violation of federal law, ignoring the mandatory requirements of the Servicemembers Civil Relief Act of 2003.

There is no dispute in American law that members of the armed forces, on active duty, are entitled as a matter of federal law to a stay of foreclosure proceedings in the enforcement of financial obligations arising prior to their current period of military service, unless a state foreclosure court enters findings of fact that the servicemember's *present* military service has not materially affected his or her personal financial capabilities.

In this case, however, Petitioner was denied a stay by the state courts and no such financial findings were ever made below. Instead, the Hawaii Circuit Court of the First Circuit ("circuit court") merely went ahead and entered decrees of foreclosure authorizing the auctioning of two real properties owned by Petitioner. On appeal, Petitioner pursuant to the 2003 Act sought a stay of

action in the Hawaii Intermediate Court of Appeals, and again in the Hawaii Supreme Court. However, both state appellate courts denied Petitioner's request and disregarded federal law. The state circuit court, once again ignoring the requirements of the 2003 Act, thereafter orally confirmed the foreclosure sales and issued a deficiency judgment at a hearing on January 8, 2009. Thus, unless the Servicemembers Civil Relief Act is enforced, Petitioner faces imminent, irrevocable loss of his real properties in violation of his federal rights.

B. Factual Background

Petitioner is a Member of the Hawaii National Guard serving on active duty with the United States Army. As a Member of the Hawaii National Guard on active duty, Appellant is entitled to the rights and relief afforded to him under Servicemembers Civil Relief Act of 2003. *See* footnote 13 *infra*.

Petitioner began his current period of active duty military service on August 15, 2007.¹ Over three years prior to his current period of active duty military service, on October 20, 2004, Petitioner obtained loans in the amount of \$588,000 and \$73,500 respectively, evidenced by promissory notes and secured by a first and second mortgage on real property located at 2895 Kalakaua Avenue,

¹ The official signed military status report for Petitioner, downloaded from the Department of Defense Manpower Data Center, is reproduced in the Appendix at A-24. The Manpower Data Center is an organization of the Department of Defense that maintains the Defense Enrollment and Eligibility Reporting System database, which is the official source of data on eligibility for military medical care and other eligibility systems.

Apartment 1502, Honolulu, Hawaii, ("Kalakaua property") from First Hawaiian Bank.

Additionally, on February 13, 2006, Petitioner executed a promissory note and obtained another loan in the amount of \$550,000 from Pacific Mortgage Investors. Said note was secured by a mortgage on four real properties, two of which were thereafter sold. The remaining properties covered by the mortgage included the Kalakaua property as well as the real property located at 1700 Ala Moana Boulevard, Apartment 2601, Honolulu, Hawaii ("Ala Moana property").

At the times Petitioner obtained the aforementioned loans, he was serving as a brigade executive officer of the United States Army National Guard and spent most of his time at his duty station on the island of Oahu. During his off-duty hours, Petitioner was able to assist his wife with their retail clothing store. Petitioner's period of duty with the United States Army National Guard was terminated after twenty years of service pursuant to official military orders on August 14, 2007. At that time, Petitioner was eligible for full retirement benefits.

Nevertheless, Petitioner, possessing specialized, needed skills, was ordered to his current, new period of active duty military service, which began on August 15, 2007. Pursuant to orders issued by the Governor of Hawaii calling Petitioner to active duty in time of national emergency as a full-time National Guardsman, Petitioner is currently serving a 36-month "period of duty."²

² The United States Army National Guard is an entity controlled by the United States Department of the Army under

Footnote continued . . .

Petitioner's duties with the Hawaii National Guard are significantly different and more demanding than his former duties with the Army National Guard. Petitioner now commands the 93rd Civil Support Team (WMD), an operational, strategic first response unit in support of the Global War on Terror. The team is staffed by 22 full-time specialists who are generally more senior than normally found in a traditional military unit. Petitioner's position falls under the command of the Governor of the State of Hawaii and his commanding officer is the Adjutant General of the State of Hawaii. Petitioner's position is highly security-sensitive and requires that he be on call 24-hours per day, 365 days per year. Depending on conditions, Petitioner must be prepared to deploy to anywhere in the world with as little as 90-minutes notice while under priority status, 24-hours notice under ready status, and 72-hours notice when on standby status.

Since September 2007, Petitioner has conducted at least six highly classified operational deployments and over twenty duty events in defense of this Nation, all requiring extensive travel and stays away from his home island of Oahu. As a result of

Title 10 of the United States Code, and is separate and legally distinct from the Hawaii National Guard. *Perpich v. Department of Defense*, 496 U.S. 334, 338 (1990) (observing that there are "two overlapping but distinct organizations . . . the National Guard of the various States and the National Guard of the United States"). Johnson's current active duty service with the Hawaii National Guard, unlike his former service, is authorized under Title 32 of the United States Code, and therefore clearly qualifies him for benefits under the provisions of the Servicemembers Civil Relief Act. See, 50 App. U.S.C. § 511(2)(A)(ii), quoted in footnote 13 *infra*.

the extraordinary demands of Petitioner's active duty position, including frequent deployments and out-of-state duty assignments, his ability to attend to his personal and financial matters, including his family business, mortgage obligations, and the present litigation, has been materially affected.

C. Proceedings Below

On October 9, 2007, Pacific Mortgage Investors filed a complaint in the state circuit court seeking to foreclose on the Kalakaua and Ala Moana properties. First Hawaiian Bank, named as a defendant, filed an answer on October 23, 2008, including an affirmative statement of claim to its first and second mortgages on the Kalakaua property.

On January 3, 2008, Pacific Mortgage Investors filed a motion for summary judgment and interlocutory decree of foreclosure as to all claims and all parties. On February 11, 2008, Petitioner filed a memorandum in opposition, based on the Servicemembers Civil Relief Act, to Pacific Mortgage's motion for summary judgment, arguing that he was entitled to a stay of action pursuant to section 533 of Title 50 Appendix to the United States Code.³ Pacific Mortgage withdrew its motion for summary judgment on February 15, 2008.

³ See Petitioner's Memorandum in Opposition to Pacific Mortgage Investors' Motion for Summary Judgment, February 11, 2008, at 5 ("The SCRA [Servicemembers Civil Relief Act], and specifically the protections of Section 533, apply to Johnson and the present foreclosure action, as the mortgagees and properties at issue were entered into and/or acquired prior to the commencement of Johnson's current active duty service with the [Hawaii] National Guard and his military service materially affects his ability to comply with the Note.")

First Hawaiian Bank amended its answer on March 17, 2008, to include a counterclaim against Pacific Mortgage and cross-claim against Petitioner. Thereafter, on April 21, 2008, First Hawaiian Bank filed a motion for summary judgment on its counterclaim and cross-claim, as to all claims and all parties, seeking an interlocutory decree of foreclosure and order of sale. Petitioner filed a memorandum in opposition on May 6, 2008, again asserting his rights under the Servicemembers Civil Relief Act.⁴

A non-evidentiary argument was held on First Hawaiian Bank's motion for summary judgment on May 14, 2008. On May 16, 2008, Petitioner filed a supplemental memorandum, yet again asserting his rights under the Servicemembers Civil Relief Act.⁵ The circuit court thereafter failed to address Petitioner's federal rights, granted First Hawaiian Bank's motion for summary judgment, and entered an interlocutory decree of foreclosure and order of sale.

The circuit court filed its findings of fact, conclusions of law, and order granting First Hawaiian Bank's motion for summary judgment, an

⁴ See also, Declaration of Thomas Johnson, III, filed May 6, 2008, at 2 ("This constant travel and demanding service commitment has materially impacted my ability to attend to my personal matters and finances as well as the present litigation.").

⁵ See, Petitioner's Supplemental Memorandum, filed May 16, 2008, at 5 ("Since his appointment as commander of the 93d Civil Support Team (WMD), however, Johnson has been unable to assist with [his family] business, and it is suffering financial losses as a result. That is one of the primary reasons he seeks relief under the Servicemembers Civil Relief Act.").

interlocutory decree of foreclosure, as well as its final judgment with respect to the Kalakaua property foreclosure, on July 16, 2008.⁶ Said orders, objected to by Petitioner, were completely silent with respect to Petitioner's federal rights asserted under the 2003 Act.⁷

Petitioner separately appealed both successive aforementioned foreclosure decrees to the Hawaii Intermediate Court of Appeals. In an effort to enforce his rights under federal law, Petitioner sought a stay of proceedings from the Hawaii Intermediate Court of Appeals pursuant to the unbonded stay provision of Section 533 of the Servicemembers Civil Relief Act. However, in violation of federal law and the Supremacy Clause of the United States Constitution, Petitioner's motion was denied on November 5, 2008, the Hawaii Intermediate Court of Appeals misconstruing

⁶ The circuit court's July 16, 2008 orders, which are set forth in the Appendix at A-1 through A-16, are the subject of the appeal now pending before the Hawaii Supreme Court, which has not yet been fully briefed. Similar orders entered on September 24, 2008, including a foreclosure decree with respect to the Ala Moana property, are currently the subject of a separate appeal now pending before the Hawaii Intermediate Court of Appeals. Petitioner is in the process of seeking logically to transfer the Ala Moana property appeal also to the Hawaii Supreme Court and to consolidate both appeals. Disposition of civil appeals in Hawaii takes approximately two to three years, whereas title to Petitioner's real properties is expected to be transferred in a matter of weeks.

⁷ The circuit court's September 24, 2008 orders regarding the Ala Moana property are likewise completely silent with respect to Petitioner's rights under the Servicemembers Civil Relief Act of 2003.

Petitioner's motion and ignoring controlling federal law, explaining that:

Although such a motion may be made to the appellate court, [Petitioner] does not demonstrate that such a motion is "impracticable" under HRAP Rule 8(a) where, notwithstanding any auction, he does not establish that confirmation of the sale is imminent, and where the Circuit Court was not provided with the opportunity to review the issue of a stay pending appeal and thus has not "denied" or "failed to afford the relief requested" in the form of a stay pending appeal.^[8]

Due to the financial hardship resulting from the extraordinary demands of his current military service, Petitioner obviously lacks the financial ability to post *supersedeas* bonds, which are necessary under the applicable court rules, to obtain stays in the circuit court pending his appeals. And regardless of the stay procedures afforded under the state court rules of procedure, the Servicemembers Civil Relief Act is a federal statute which cannot be circumvented by state law.

Therefore, on December 26, 2008, Petitioner filed a petition in the Hawaii Supreme Court requesting, *inter alia*, that his appeal regarding the Kalakaua property foreclosure be transferred from the Hawaii intermediate court of appeals to the Hawaii Supreme Court for decision, and that the Hawaii Supreme Court issue an unbonded stay of the Kalakaua

⁸ The Hawaii Intermediate Court of Appeals Opinion, filed November 5, 2008, is set forth in the Appendix at A-17.

property foreclosure decree pursuant to Section 533 of Title 50 of the United States Code.

The Kalakaua property was auctioned on November 5, 2008, and the Ala Moana property similarly auctioned on November 25, 2008. Pacific Mortgage Investors thereafter filed a motion seeking confirmation of the sales and entry of a deficiency judgment against Petitioner. A hearing on the motion was held in the Hawaii circuit court on January 8, 2009, the circuit court orally granting the motion, ordering that title transfer within thirty days, and ordering a deficiency judgment against Petitioner. An order confirming the Hawaii circuit court's oral ruling has not yet been filed.⁹

On January 30, 2009, the Hawaii Supreme Court entered an order granting Petitioner's request for transfer of the appeal to it for decision, but denying his request for a stay of action under Section 533 of the Servicemembers Civil Relief Act.¹⁰ Therefore, Petitioner faces imminent, irrevocable harm pursuant to execution of the Hawaii circuit court's order confirming the sales and granting a deficiency judgment.

LEGAL ARGUMENT

The Hawaii state courts, *sub silentio*, completely disregarded federal law and the fundamental public importance of enabling Petitioner to devote his entire energies to the defense needs of this Nation

⁹ Pursuant to Hawaii law, high bidders at foreclosure auctions have no vested rights or standing until written confirmation-of-sale orders are filed. *Brent v. Staveris Development Corp.*, 741 P.2d 722, 726 (Haw. Ct. App. 1987).

¹⁰ The Hawaii Supreme Court's Order filed January 30, 2009, is set forth in the Appendix at A-21.

during time of war. The state courts' jurisdictionally defective orders violate the Servicemembers Civil Relief Act of 2003, the Supremacy Clause of the United States Constitution, and the will of the United States Congress.

The Servicemembers Civil Relief Act of 2003 was enacted as a revision of the Soldiers' and Sailors' Civil Relief Act of 1940, pursuant to the war powers of Article I, Section 8, United States Constitution,¹¹ and is applicable to the states and their political subdivisions, 50 App. U.S.C. § 512(a)(2). The 2003 Act seeks to serve the following purposes:

- (1) to provide for, strengthen, and expedite the national defense through protection extended by this Act [said sections] to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and
- (2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

50 App. U.S.C. § 502.

¹¹ The Soldiers' and Sailors' Civil Relief Act was long recognized as a proper constitutional exercise of the Congressional War Powers. *Twitchell v. Home Owners' Loan Corp.*, 122 P.2d 210, 212 (Ariz. 1942) ("There can be no question of the constitutionality of the act. It is a war measure within the power of Congress therefore the supreme law of the land." (quoting *Hoffman v. Charlestown Five Cents Sav. Bank*, 121 N.E. 15 (Mass. 1918)).

The provisions of the Servicemembers Civil Relief Act moreover “are to be ‘liberally construed’ in favor of the men and women serving our country and applied in a broad spirit of gratitude towards service personnel,” *Lazarski v. Archdiocese of Philadelphia*, 926 A.2d 459, 468 (Pa. Super. 2007) (citations omitted), so as “to protect those who have been obliged to drop their own affairs to take up the burdens of the nation,” *Reed v. Albaaj*, 723 N.W.2d 50, 54 (Minn. App. 2006) (citations and internal quotation omitted).¹²

Section 533 of the Servicemembers Civil Relief Act imposes a jurisdictional limit on the power of state courts to foreclose on properties owned by active duty servicemembers. Section 533 applies “to an obligation on real or personal property owned by a servicemember that (1) originated before the period of the servicemember’s military service¹³ and

¹² See also, *Lenser v. McGowan*, 191 S.W.3d. 506, 509 (Ark. 2004) (“The statute is to be liberally construed to prevent persons in military service from suffering prejudice caused by being in the military and away in the service of the nation.”); *In re Watson*, 292 B.R. 441, 444 (Bkrtcy. S.D. Ga. 2003) (the Act must be “liberally construed to effectuate its purpose”); *In re Bashor*, 132 P.2d 1027, 1028 (Wash. 1943) (“The act should be liberally construed in favor of the individual engaged in military service . . . [so that] soldiers and sailors in the service who are handicapped by reason of their military service, either in making valid defenses to an action or in meeting their financial obligations, shall have the protection of the courts to prevent prejudice to their rights by reason of the service.”)

¹³ Pursuant to Section 511(2)(A)(ii) of Title 50 Appendix of the United States Code, military service “in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, United States Code, for purposes of

Footnote continued . . .

for which the servicemember is still obligated; and (2) is secured by a mortgage, trust deed, or other security in the nature of a mortgage." 50 App. U.S.C. § 533(a). Upon application of a servicemember, Section 533(b) provides that the court "shall" issue a stay of foreclosure proceedings and adjust the terms of the obligation where the servicemember's military duties have materially affected his or her ability to comply with the mortgage obligation.

The foreclosing mortgagees in this case, in their memoranda filed in the state courts below, would have the courts believe that Congress intended the phrase "the servicemember's period of military service," as it appears in Section 533(a), to include any and all periods of military service occurring within a person's lifetime.

Therefore, the foreclosing mortgagees assert that because Petitioner was a member of the military at the time the loans originated, he is not entitled to the protections of Section 533, even though the obligations at issue arose prior to the period of military service for which Petitioner remains obligated. Such a conclusion is not supported by the plain language of the statute, is inconsistent with the stated purposes and spirit of the Act, and certainly is contrary to the policy of liberal construction in favor of the servicemember.¹⁴

responding to a national emergency declared by the President and supported by Federal funds."

¹⁴ To suggest that servicemembers whose active duty ends and then are recalled to active duty because of vitally needed skills are not entitled to the protections of the 2003 Act would be just as mistaken as suggesting that a civilian entering active duty after immediately securing a mortgage would somehow not be entitled to those Congressionally mandated protections.

Congress has defined the phrase “period of military service” for purposes of the 2003 Act as “the period beginning on the date on which a servicemember enters military service and ending on the date on which the servicemember is released from military service or dies while in military service.” 50 App. U.S.C. § 511. A careful examination of the specific language of Section 533(a) reveals that Congress intended the phrase “the servicemember’s period of military service” as it appears therein to mean the current service period, just as the phrase “the period of duty” in Petitioner’s active duty orders refers to his current service period.

Congress could have very easily stated that Section 533(b) applied only to obligations arising before “a period” or “any period” of military service, as it used such broad language, for example, in Section 526(b) (“A period of military service may not be included in computing any period provided by law for the redemption of real property sold or forfeited to enforce an obligation, tax, or assessment”). But by making Section 533 applicable to obligations arising before the period of military service “for which the servicemember is still obligated[,]” Congress clearly intended to afford the protections of Section 533 to persons who return to the military, following release from service, for obligations which arose prior to their *present* commitment.

And Congress further charged state foreclosure courts with the duty (“shall”) of making findings with respect to whether a servicemember’s ability to meet his or her mortgage obligations has been materially affected by the demands of military

service,¹⁵ placing the burden of proof on the foreclosing mortgagee to prove that the servicemember's active duty military service does not materially affect his or her ability to meet the current mortgage obligations.¹⁶ However, no such proof and no such findings were offered below.

Petitioner nevertheless put forth substantial, credible, and irrefutable evidence demonstrating that the loans at issue originated over three years prior to his current period of active duty, and that his current ability to meet his financial obligations has been materially affected by the extraordinary demands of his current period of military service. However, the circuit court failed to consider Petitioner's evidence or enter any requisite findings despite Petitioner's repeated objections. And all of

¹⁵ *Coburn v. Coburn*, 412 So.2d 947, 949 (Fla. Dist. Ct. App. 1982) ("The overwhelming majority of the cases of other jurisdictions . . . hold that a court in denying a stay of proceedings under the Act should make findings that the soldier's ability to defend is not materially affected by military service . . . and that in the absence of such findings entry of judgment against the serviceman is improper." (citing *Mays v. Tharpe & Brooks, Inc.*, 240 S.E.2d 159 (Ga. Ct. App. 1977); *Mathis v. Mathis*, 236 So.2d 755 (Miss. 1970); *Stringfellow v. Whichelo*, 230 A.2d 858 (R.I. 1967); *Esposito v. Schille*, 40 A.2d 745 (Conn. 1944)).

¹⁶ *Coburn*, 412 So.2d 947, 949 ("It is clear from a reading of the statute, and is supported by most of the cases, that the burden is on the party who opposes postponement of a trial"); *Pacific Greyhound Lines v. Superior Court of City and County of San Francisco*, 168 P.2d 665, 668 (Cal. 1946) (same). See also, *Vlasz v. Schweikhhardt*, 343 S.E.2d 749, 750 (Ga. Ct. App. 1986); *La Face v. Incorvia*, 113 N.E.2d 128, 129 (Ohio Com. Pl. 1952); *Meyers v. Schmidt*, 46 N.Y.S.2d 420, 422 (N.Y. Co. Ct. 1944).

the orders issued by the state courts below are completely silent with respect to any consideration or any application of the mandatory provisions of the Servicemembers Civil Relief Act whatsoever.

This Court cannot permit state courts to thus simply ignore federal law and the needs of our national defense. Persons who return to the military, especially those like Petitioner with specialized skills called back to active duty, are protected under the provisions of the Servicemembers Civil Relief Act when they are asked again to "drop their own affairs to take up the burdens of the nation." Otherwise, highly trained and experienced military leaders like Petitioner, who are indispensable to the successful defense of the Nation, might be forced to remain retired than risk losing personal assets as a result of returning to military service, as opposed to once again setting aside personal affairs, and contributing their skills and talents to the national defense.

Petitioner has exhausted his state court remedies, having asserted his federal rights under the 2003 Act in the original foreclosure action before the circuit court, again before the Hawaii Intermediate Court of Appeals, and finally before the Hawaii Supreme Court, all of whom completely ignored federal law and denied Petitioner his federal rights as an active duty servicemember. Petitioner's request for a stay under federal law now having been denied by the Hawaii Supreme Court, no other remedy remains available to him besides the extraordinary writs prayed for herein.¹⁷

¹⁷ Because the Hawaii state courts failed to recognize and uphold federal law, Petitioner's appeal now pending before the Hawaii Supreme Court, according to the foreclosing mortgagees, will be rendered moot under state law once the

Footnote continued . . .

Moreover, having failed to comply with the requirements of the 2003 Act, the state courts' orders below are jurisdictionally void as a matter of federal law. Petitioner's only remaining source of redress with respect to his federal rights is for this Court, in aid of its appellate jurisdiction and its superintendence of federal law, to issue an extraordinary writ requiring the Hawaii Supreme Court to stay the foreclosure action and prohibiting execution of the state courts' jurisdictionally defective orders.

CONCLUSION

For all of the foregoing reasons, the Petition should be granted.

Respectfully submitted,

/s/ Gary Victor Dubin

GARY VICTOR DUBIN
Counsel of Record

LONG H. VU
FREDERICK J. ARENSMEYER
Attorneys for Petitioner

Honolulu, Hawaii
February 9, 2009

circuit court's order confirming the foreclosure sales is filed and titles are transferred, which is likely to occur in early March 2009. *Lathrop v. Sakatani*, 141 P.3d 480, 486 (Haw. 2006) ("it is appellant's burden to seek a stay if post-appeal transactions could render the appeal moot" (citations omitted)); *City Bank v. Saje Ventures II*, 748 P.2d 812, 813-14 (Haw. Ct. App. 1988) (holding that, where an appellant fails to obtain a stay, confirmation of a foreclosure sale renders an appeal moot).

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APPENDIX

A. State Circuit Court Order Granting Summary Judgment, Interlocutory Decree of Foreclosure, and Order of Sale, Filed July 16, 2008.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT [OF THE] STATE OF HAWAII

PACIFIC MORTGAGE INVESTORS LLC,) CIVIL NO. 07-1-1893) (FORECLOSURE)
Plaintiff, Counterclaim Defendant,) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING DEFENDANT FIRST HAWAIIAN BANK'S MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIM AND CROSS-CLAIM AS TO PLAINTIFF AND DEFENDANT THOMAS MOSES JOHNSON, III, IN ALL RESPECTS EXCEPT THAT REQUESTS FOR ATTORNEYS FEES ARE DENIED WITHOUT PREJUDICE, INTERLOCUTORY DECREE OF FORECLOSURE AND ORDER OF SALE
v. THOMAS MOSES JOHNSON, III, also known as Thomas M. Johnson, III, FIRST HAWAIIAN BANK; BANK OF HAWAII; JOHN DOES 1-5; JANE DOES 1-5; DOE CORPORATIONS 1-5; DOE GOVERNMENTAL AGENCIES 1-5; DOE PARTNERSHIPS 1-5; and DOE ENTITIES 1-5, Defendants.) FILED APRIL 21, 2008; EXHIBIT "A"
FIRST HAWAIIAN BANK, Counterclaim Plaintiff, vs.) Hearing Date: May 14, 2008 Time: 9:00 a.m.

PACIFIC MORTGAGE INVESTORS LLC, } Judge: Karen N.
} Blondin
Counterclaim Defendant, } NO TRIAL DATE SET
and }
THOMAS MOSES }
JOHNSON, III, also }
known as Thomas M. }
Johnson, III; JOHN }
DOES 1-5; JANE DOES }
1-5; DOE }
CORPORATIONS 2-5; }
DOE GOVERNMENTAL }
AGENCIES 1-5; DOE }
PARTNERSHIPS 1-5; }
and DOE ENTITIES 2-5, }
Cross-Claim }
Defendants, }
and }
JOHN DOES 6-20; JANE }
DOES 6-20; DOE }
PARTNERSHIPS 6-20; }
DOE CORPORATIONS }
6-20; DOE "NON- }
PROFIT" }
CORPORATIONS 6-20; }
and DOE }
GOVERNMENTAL }
UNITS 6-20, }
Additional }
Defendants on }
Cross-Claim, }
and }
COLONY SURF, LTD.; }
COLONY SURF }
ASSOCIATION OF }

APARTMENT OWNERS,) }
Identified)
Defendant Doe)
Corporation 1)
and Doe Entity 1.)

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER GRANTING
DEFENDANT FIRST HAWAIIAN BANK'S
MOTION FOR SUMMARY JUDGMENT ON
COUNTERCLAIM AND CROSS-CLAIM AS
TO PLAINTIFF AND DEFENDANT THOMAS
MOSES JOHNSON, III IN ALL RESPECTS
EXCEPT THAT REQUEST FOR ATTORNEYS'
FEES ARE DENIED WITHOUT PREJUDICE,
INTERLOCUTORY DECREE OF FORECLOSURE
AND ORDER OF SALE FILED APRIL 21, 2008**

Defendant FIRST HAWAIIAN BANK's Motion for Summary Judgment on Counterclaim and Cross-Claim as to All Claims and all Parties, Interlocutory Decree of Foreclosure and Order of Sale filed herein on April 21, 2008 (the "Motion"), came on for hearing before the Honorable Karen N. Blondin on May 14, 2008 at 9:00 a.m. Defendant FIRST HAWAIIAN BANK was represented by Jonathan W.Y. Lai. Plaintiff PACIFIC MORTGAGE INVESTORS LLC was represented by Keith M. Kiuchi and Randall I. Morikawa. Defendant THOMAS MOSES JOHNSON, III was represented by Steven S. Chung. There were no other appearances. Based upon the pleadings and records of this action and after argument by counsel regarding said Motion, this Court makes the following Findings of Fact, Conclusions of Law and Order Granting Defendant First Hawaiian Bank's Motion for Summary Judgment on Counterclaim and

Cross-Claim as to Plaintiff and Defendant and Thomas Moses Johnson, III in App Respects Except That Request for Attorneys' Fees Are Denied Without Prejudice, Interlocutory Decree of Foreclosure and Order of Sale.

FINDINGS OF FACT

1. Defendant FIRST HAWAIIAN BANK ("FHB") is and was, at all times relevant herein, a Hawaii corporation with its principal place business in the City and County of Honolulu, State of Hawaii.
2. Defendant THOMAS MOSES JOHNSON, III, also known as Thomas M. Johnson, III ("Defendant JOHNSON") is, and was at all times relevant herein, a resident of the City and County of Honolulu, State of Hawaii..
3. Plaintiff PACIFIC MORTGAGE INVESTORS LLC ("Plaintiff") is and was, at all times relevant herein, a Hawaii limited liability company with its principal place of business in the City and County of Honolulu, State of Hawaii.

COUNT I

4. On or about October 20, 2004, FHB made a loan in the principal amount of FIVE HUNDRED EIGHTY-EIGHT THOUSAND AND NO/100 DOLLARS (\$588,000.00) to Defendant JOHNSON, which loan was evidenced by the certain Adjustable Rate Note (1 Year Treasury Index – Rate Caps) dated October 20, 2004 in the amount of \$588,000.00 ("Note #1"). Note #1 was made, executed, and delivered to FHB by Defendant JOHNSON. A true and correct copy of Note #1 is attached as Exhibit "A" to Defendant First Hawaiian Bank's Motion for Summary Judgment on Counterclaim and Cross-

Claim as to All Claims and all Parties, Interlocutory Decree of Foreclosure and Order of Sale filed April 21, 2008 (the "MSJ") and made a part hereof.

5. As security for the repayment of the land and the performance and the observance of the obligations of Defendant JOHNSON under Note #1, Defendant JOHNSON granted, executed, and delivered to FHB that certain Mortgage and Financing Statement dated October 20, 2004, recorded in the Bureau of Conveyances of the State of Hawaii as Document no. 2004-216091 ("Mortgage #1"), covering and granting FHB a first leasehold mortgage lien and security interest in and to the real and personal property described therein comprising a portion of the "Colony Surf Apartments" cooperative apartment building and situated at 2895 Kalakaua Avenue, Apt. No. 1502, Honolulu, Hawaii 95815, Tax Map Key No. (1) 3-1-032-010 HPR 0119 and one share of stock in Colony Surf, Ltd. (collectively, the "Colony Surf Property"). A true and correct copy of Mortgage #1 is attached as Exhibit "B" to the MSJ and made a part hereof.

6. Defendant JOHNSON has defaulted in the observance and the performance of the terms, covenants, and conditions set forth in Note #1 and Mortgage #1 in that he has failed, neglected, and refused to make his monthly payments as required under Note #1 and Mortgage #1 in the manner provided therein and is consequently in default thereunder.

7. Notwithstanding due and proper demand made upon Defendant JOHNSON for payment of the amounts due and owing to FHB, Defendant JOHNSON has failed, neglected, and refused, and

continues to fail, neglect, and refuse to make payment under Note #1 and Mortgage #1 to FHB and is consequently in default.

8. Due to his failure to make payment of the amounts due under Note #1 and Mortgage #1, Defendant JOHNSON continues to be in default and, in accordance with the terms thereof, the entire amount of the indebtedness thereunder has been accelerated and is immediately due and payable.

9. FHB is and continues to be the holder of Note #1 and Mortgage #1 and, as of April 08, 2008, Defendant JOHNSON is indebted to FHB in the following amounts:

Principal Balance:	\$550,647.79
Interest to 4/8/08:	6,140.10
Accumulated late charges:	<u>0.00</u>
TOTAL	<u>\$556,787.89</u>

Interest continues to accrue at an adjustable rate of interest, which is currently accruing at a rate of 6.00% per year, \$90.52 per diem, together with late charges accruing pursuant to the terms of Note #1. FHB has incurred and continues to incur attorneys' fees and costs in connection herewith and such amounts are secured by Note #1 and Mortgage #1.

COUNT II

10. On or about October 20, 2004, FHB made a loan in the principal amount not to exceed SEVENTY-THREE THOUSAND FIVE HUNDRED AND NO/100 DOLLARS (73,500.00) to Defendant JOHNSON, which loan was evidenced by that certain Equity Firstline Agreement dated October 20, 2004 in the amount of \$73,500.00 ("Note #2"). Note #2 was made, executed, and delivered to FHB

by Defendant JOHNSON. A true and correct copy of Note #2 is attached as Exhibit "D" to the MSJ and made a part hereof.

11. As security for the repayment of the loan and the performance and the observance of the obligations of the Defendant JOHNSON under Note #2, Defendant JOHNSON granted, executed, and delivered to FHB that certain Mortgage dated October 20, 2004, recorded in sad Bureau as Document No. 2004-216093 ("Mortgage #2"), covering and granting FHB a second leasehold mortgage lien and security interest in and to the Colony Surf Property. A true and correct copy of mortgage #2 is attached as Exhibit "E" to the MSJ and made a party hereof.

12. Defendant JOHNSON has defaulted in the observance and performance of the terms, covenants, and conditions set forth in Note #2 and Mortgage #2 in that he has failed, neglected, and refused to perform all his obligations under any mortgage or other security agreement with a prior lien.

13. Notwithstanding due and proper demand made upon Defendant JOHNSON to perform all his obligations under any mortgage or other security agreement with a prior lien, Defendant JOHNSON has failed, neglected, and refused, and continues to fail, neglect, and refuse to perform all his obligations under any mortgage or other security agreement with a prior lien and is consequently in default.

14. Due to his failure to perform all his obligations under any mortgage or other security agreement with a prior lien, Defendant JOHNSON continues to be in default and, in accordance with the terms thereof, the entire amount of the

indebtedness thereunder has been accelerated and is immediately due and payable.

15. FHB is and continues to be the holder of Note #2 and Mortgage #2 and, as of April 8, 2008, Defendant JOHNSON is indebted to FHB in the following amounts:

Principal Balance:	\$71,410.51
Interest to 4/8/08:	984.10
Accumulated late charges:	27.45
Fees due:	<u>14.50</u>
TOTAL	<u>\$72,436.56</u>

Interest continues to accrue at an adjustable rate of interest, which is currently accruing at a rate of 6.38% per year, \$12.655 per diem, together with late charges accruing pursuant to the terms of Note #2. FHB has incurred and continues to incur attorneys' fees and costs in connection herewith and such amounts are secured by Note #2 and Mortgage #2.

16. Pursuant to the provisions of Note #1, Note #2, Mortgage #1, and Mortgage #2, FHB is entitled to foreclose upon its mortgage liens and security interests in and to the Colony Surf Property and is entitled to reimbursement of its costs and reasonable attorneys' fees incurred in connection herewith.

17. FHB's mortgage liens and security interests are valid and subsisting mortgage liens and security interests upon the Colony Surf Property.

CONCLUSION OF LAW

1. This Court has jurisdiction over all parties and the claims involved in this action.

2. FHB is entitled to foreclose upon its mortgage liens and security interests upon the Colony Surf

Property.

3. The interests of Plaintiff and Defendant JOHNSON in the Colony Surf Property, if any, are junior and subordinate to FHB's mortgage lien and security interest.

ORDER GRANTING FHB'S MOTION FOR
SUMMARY JUDGMENT ON COUNTERCLAIM
AND CROSS-CLAIM AS TO PLAINTIFF AND
DEFENDANT THOMAS MOSES JOHNSON,
III IN ALL RESPECTS EXCEPT THAT
REQUEST FOR ATTORNEYS' FEES ARE
DENIED WITHOUT PREJUDICE,
INTERLOCUTORY DECREE OF FORECLOSURE
AND ORDER OF SALE FILED APRIL 21, 2008

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That at the hearing for the Motion, FHB clarified that the Motion seeks relief only against Plaintiff and Defendant Thomas Moses Johnson, III.

2. That the preceding Findings of Fact and Conclusion of Law are hereby entered and FHB's Motion for Summary Judgment on Counterclaim and Cross-Claim as to Plaintiff and Defendant Thomas Moses Johnson, III in All Respects Except That Request for Attorneys' Fees Are Denied Without Prejudice, Interlocutory Decree of Foreclosure and Order of Sale is hereby granted in its entirety.

3. That Mortgage #1 and Mortgage #2 in favor of FHB constitutes [sic] valid and subsisting mortgage liens and security interests on the Colony Surf Property and the Mortgages are foreclosed upon as prayed.

4. Pablo P. Quiban, whose address is 707

Richards Street, #710, Honolulu, Hawaii 96813, and
whose telephone number is 528-3958 is hereby
appointed Commissioner by this Court and is
authorized and directed to sell the Colony Surf
Property.

5. The Colony Surf Property shall be sold at a public auction or by private sale and shall be sold in an "as is", "where is" condition without warranties of any nature, express or implied, and there shall be no upset price. The Commissioner shall accept the highest bid and shall require a down payment of ten percent (10%) of the bid price at the fall of the hammer in cash or certified or cashier's check, the balance of the purchase price to be paid concurrently with the conveyance of the Colony Surf Property to the purchaser(s). At the Court's discretion, the 10% down payment may be forfeited in full or in part if the purchaser shall fail to pay the balance of the purchase price as set forth herein. The purchaser(s) shall pay the cost of conveyancing, recordation and conveyance taxes and shall pay for and be responsible for securing possession of the Colony Surf Property. The sale shall not be final until approved and confirmed by the Court.

6. The Commissioner shall give notice of the foreclosure sale by publication once in each of three (3) publications, with the last publication to be not less than fourteen (14) days before the date of sale, in a newspaper having general circulation in the county in which the Colony Surf Property lay. [sic] The notice need not contain the full legal description of the Colony Surf Property. The notice shall give the date, time, and place of sale and an intelligible description of the Colony Surf Property, disclosing all terms of the sale as mentioned above. Except for

the lien of real property taxes and those reflected in the attached Exhibit "A", the Colony Surf Property shall be sold free and clear of all liens and encumbrances, including all liens and encumbrances of any nature arising upon the Colony Surf Property subsequent to the recordation of the Notice of Pendency of Action filed herein. The sale shall perpetually bar Defendant JOHNSON, Plaintiff and all persons or institutions claiming by, through or under them from any and all right, title and interest in the Colony Surf Property.

7. The Commissioner shall file an accurate accounting of all receipts and expenses and shall be awarded such fees and reimbursement of expenses as the Court shall determine to be reasonable.

8. FHB is authorized to be a purchaser at said sale and the amount determined by this Court to be due and owing to FHB under Note #1 and Note #2 may be credited against the total bid price which FHB shall make at said sale. If FHB is the successful bidder at said sale, the ten percent (10%) down payment will not be required of FHB up to the amount of its secured indebtedness.

9. A hearing shall be held to confirm the foreclosure sale, the amounts due FHB, including its attorneys fees and costs, the Commissioner's fees and expenses, the amounts due and the priorities of the liens of the parties to this action. The Commissioner's fees and costs shall be determined to be secured by FHB's mortgage lien and security interest on the Colony Surf Property.

10. The Court shall retain jurisdiction over the claims and the interests of the parties and the distribution of the sale proceeds resulting from the

sale of the Colony Surf Property.

11. The Commissioner shall be authorized and instructed to receive the full amount of all rents, if any, resulting from the Colony Surf Property and to expend reasonable sums as may be necessary to enable the Colony Surf Property to be rented and to hold the rentals until distribution is authorized by order of this Court.

12. Insofar as attorneys' fees have been sought by FHB, the Motion is denied without prejudice. The Motion is granted in all other respects.

13. NOTICE IS HEREBY GIVEN THAT THIS ACTION IS AN ATTEMPT TO COLLECT A DEBT, THAT ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE, AND THAT THE DEBT MAY BE DISPUTED.

14. Pursuant to Rule 54(b) of the Hawaii Rules of Civil Procedure, the foregoing shall be considered as a final order and judgment and there shall be no just reason for delay.

15. This Order may be approved as to form in counterparts, and all counterparts so executed shall be deemed to be one and the same instrument, binding on all of the parties hereto, notwithstanding that all parties are not signatories to the original or the same counterparts. For all purposes, duplicated unexecuted pages of the counterparts may be discarded and the remaining pages assembled as one document.

DATED: Honolulu, Hawaii, JUL 16 2008.

/S/ KAREN N. BLONDIN
Judge of the above-entitled court

**B. State Circuit
Court Judgment
Filed July 16, 2008**

**IN THE CIRCUIT COURT OF THE FIRST
CIRCUIT [OF THE] STATE OF HAWAII**

PACIFIC MORTGAGE INVESTORS LLC,) CIVIL NO. 07-1-1893) (FORECLOSURE)	
Plaintiff, Counterclaim Defendant,) JUDGMENT RE: FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING DEFENDANT FIRST HAWAIIAN BANK'S MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIM AND CROSS-CLAIM AS TO PLAINTIFF AND DEFENDANT THOMAS MOSES JOHNSON, III IN ALL RESPECTS EXCEPT THAT REQUESTS FOR ATTORNEYS FEES ARE DENIED WITHOUT PREJUDICE, INTERLOCUTORY DECREE OF FORECLOSURE AND ORDER OF SALE	
v. THOMAS MOSES JOHNSON, III, also known as Thomas M. Johnson, III, FIRST HAWAIIAN BANK; BANK OF HAWAII; JOHN DOES 1-5; JANE DOES 1-5; DOE CORPORATIONS 1-5; DOE GOVERNMENTAL AGENCIES 1-5; DOE PARTNERSHIPS 1-5; and DOE ENTITIES 1-5, Defendants.) FILED APRIL 21, 2008	
FIRST HAWAIIAN BANK,) Hearing vs. PACIFIC MORTGAGE INVESTORS LLC,) Date: May 14, 2008 Time: 9:00 a.m. Judge: Karen N. Blondin

Counterclaim
Defendant,

} NO TRIAL DATE SET

and

THOMAS MOSES
JOHNSON, III, also
known as Thomas M.
Johnson, III; JOHN
DOES 1-5; JANE DOES
1-5; DOE
CORPORATIONS 2-5;
DOE GOVERNMENTAL
AGENCIES 1-5; DOE
PARTNERSHIPS 1-5;
and DOE ENTITIES 2-5,

Cross-Claim
Defendants,

and

JOHN DOES 6-20; JANE
DOES 6-20; DOE
PARTNERSHIPS 6-20;
DOE CORPORATIONS
6-20; DOE "NON-
PROFIT"
CORPORATIONS 6-20;
and DOE
GOVERNMENTAL
UNITS 6-20,

Additional
Defendants on
Cross-Claim,

and

COLONY SURF, LTD.;
COLONY SURF
ASSOCIATION OF
APARTMENT OWNERS,

Identified
Defendant Doe }
Corporation 1 }
and Doe Entity 1. }

**JUDGMENT RE: FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
GRANTING DEFENDANT FIRST HAWAIIAN
BANK'S MOTION FOR SUMMARY JUDGMENT
ON COUNTERCLAIM AND CROSS-CLAIM AS
TO PLAINTIFF AND DEFENDANT THOMAS
MOSES JOHNSON, III IN ALL RESPECTS
EXCEPT THAT REQUESTS FOR ATTORNEYS
FEES ARE DENIED WITHOUT PREJUDICE,
INTERLOCUTORY DECREE OF FORECLOSURE
AND ORDER OF SALE FILED APRIL 21, 2008**

In accordance with Rule 58 of the Hawaii Rules of Civil Procedure, and pursuant to that certain "Findings of Fact and Conclusion of Law are hereby entered and FHB's Motion for Summary Judgment on Counterclaim and Cross-Claim as to Plaintiff and Defendant Thomas Moses Johnson, III in All Respects Except That Request for Attorneys' Fees Are Denied Without Prejudice, Interlocutory Decree of Foreclosure and Order of Sale Filed April 21, 2008; Exhibit "A" filed herein, summary judgment and an interlocutory decree of foreclosure are hereby entered in favor of Defendant FIRST HAWAIIAN BANK ("FHB") and against Plaintiff and Defendant Thomas Moses Johnson III on FHB's Counterclaim and Cross-Claim. This Court expressly directs that said summary judgment and interlocutory decree of foreclosure are entered as a final judgment as there are no just reasons for delay, pursuant to Rule 54(b) of the Hawaii Rules of Civil Procedure.

This Judgment may be approved as to form in counterparts, and all counterparts so executed shall

be deemed to be one and the same instrument,
binding on all of the parties hereto, notwithstanding
that all of the parties are not signatories to the
original or the same counterparts. For all proposes,
duplicated and unexecuted pages of the counterparts
may be discarded and the remaining pages
assembled as one document.

DATED: Honolulu, Hawaii, JUL 16 2008.

/S/ KAREN N. BLONDIN
Judge of the above-entitled court

**C. Hawaii Intermediate Court
of Appeals Order Denying Stay,
Filed November 5, 2008**

No. 29317

**IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I**

**PACIFIC MORTGAGE INVESTORS, LLC,
Plaintiff/Counterclaim Defendant-Appellee,**

v.

**THOMAS MOSES JOHNSON, III, also known as
Thomas M. Johnson, III,
Defendant/Cross-Claim Defendant-Appellant,**

and

**FIRST HAWAIIAN BANK,
Defendant/Counterclaim Plaintiff/Cross-
Claimant/Appellee,**

and

BANK OF HAWAII, Defendant-Appellee,

and

**JOHN DOES 1-5, JANE DOES 1-5, DOE
PARTNERSHIPS 1-5, DOE CORPORATIONS 2-5,
DOE ENTITIES 2-5 and DOE GOVERNMENTAL
UNITS, 1-5,**

Defendants/Cross-Claim Defendants-Appellees,

and

**JOHN DOES 6-20, JANE DOES 6-20, DOE
PARTNERSHIPS 6-20, DOE CORPORATIONS 6-20,
DOE "NON-PROFIT" CORPORATIONS 6-20, and
DOE GOVERNMENTAL UNITS 6-20,**

Additional Defendants on Cross-Claim Appellees,
and

COLONY SURF, LTD., COLONY SURF
ASSOCIATION OF APARTMENT OWNERS,
Identified Defendants/Cross-Claim
Defendants/Appellees Doe Corporation 1 and Doe
Entity 1

APPEAL FROM THE CIRCUIT COURT OF THE
FIRST CIRCUIT
(CIVIL NO. 07-1-1893)

ORDER
(By: Foley, J.)

Upon consideration of the "Motion (1) For Emergency Stay and (2) Either for Summary Reversal or for Limited Remand for Entry of Amended Findings of Fact and Conclusions of Law" (Motion for Stay, Reversal, or Remand) filed on November 3, 2008 by Gary Victor Dubin (Dubin) on behalf of Defendant/Cross-Claim Defendant/Appellant Thomas Moses Johnson III (Johnson), the papers in support and opposition, and the records and files herein, it appears that:

(1) Dubin, on behalf of Johnson, filed a notice of appeal on August 14, 2008, appealing, inter alia, the July 16, 2008 first circuit court judgment in favor of Defendant/Counterclaim Plaintiff/Cross-Claimant/Appellee First Hawaiian Bank (FHB) and against Plaintiff/Counterclaim Defendant/Appellee Pacific Mortgage Investors LLC and Johnson on FHB's counterclaim and cross-claim and predicated upon its prior July 16, 2008 findings of fact, conclusions of law, and order that, inter alia, granted to FHB summary judgment, and interlocutory decree of

foreclosure, and order of sale;

(2) On November 3, 2008, more than two months from the filing of the notice of appeal, Johnson now seeks (a) an emergency stay of the aforesaid order and judgment in light of a foreclosure auction to occur on November 5, 2008; and (b) immediate reversal of the circuit court's order and judgment or a limited remand for entry of amended findings of fact and conclusions of law;

(3) Johnson did not file a motion in the circuit court [sic] a motion to stay subsequent to the filing of the instant appeal pursuant to Rule 8(a) of the Hawai'i Rules of Appellate Procedure (HRAP);¹

(4) Although such a motion may be made to the appellate court, Johnson does not demonstrate that such a motion is "impracticable" under HRAP Rule 8(a)² where, notwithstanding any auction, he does

¹ HRAP Rule 8(a) states, in pertinent part:

RULE 8. STAYS, SUPERSEDEAS BONDS, OR INJUNCTIONS PENDING APPEAL

(a) Motions for Stay, Supersedeas bond or Injunction in the Appellate Courts. A motion for stay of the judgment or order in a civil appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal shall ordinarily be made in the first instance to the court or agency appealed from.

² HRAP Rule 8(a) goes on to state, in relevant part:

A motion for such relief on appeal may be made to the appellate court before which the appeal is pending or to a judge thereof, but, if the appeal is from a court, the motion shall show that application to the court appealed from for the relief sought is not practicable, or that the court appealed from has denied an application, or has failed to afford the relief the applicant requested, with the reasons given by the court appealed from for its action.

not establish that confirmation of the sale is imminent, and where the circuit court was not provided with the opportunity to review the issue of a stay pending appeal and thus has not "denied" or "failed to afford the relief requested" in the form of a stay pending appeal;

(5) Requirements of time in view of the circumstances favor prompt action of the court; and

(6) Johnson does not demonstrate that an immediate reversal or a temporary remand is warranted;

Therefore,

IT IS HEREBY ORDERED that:

(1) the motion for emergency stay is denied without prejudice to Johnson's filing forthwith a similar motion in the circuit court; and

(2) the motion for summary reversal or limited remand is denied.

DATED: Honolulu, Hawai'i, November 5, 2008.

/s/ Daniel R. Foley

Associate Judge

**D. Hawaii Supreme Court
Order Denying Stay,
Filed January 30, 2009**

NO. 29317

**IN THE SUPREME COURT
OF THE STATE OF HAWAII**

**PACIFIC MORTGAGE INVESTORS LLC,
Respondent/Plaintiff-Appellee,**

vs.

**THOMAS MOSES JOHNSON, III, also know as
Thomas M. Johnson, III,
Petitioner/Defendant-Appellant,**

and

**FIRST HAWAIIAN BANK and BANK OF HAWAII
Respondents/Defendants-Appellees,**

and

**JOHN DOES 1-5; JANE DOES 1-5; DOE
PARTNERSHIPS 1-5; DOE CORPORATIONS 1-5;
DOE ENTITIES 1-5; and DOE GOVERNMENTAL
UNITS 1-5, Defendants.**

**FIRST HAWAIIAN BANK,
Respondent/Counterclaim Plaintiff-Appellee,**

vs.

**PACIFIC MORTGAGE INVESTORS, LLC,
Respondent/Counterclaim Defendant-Appellee,**

and

**THOMAS MOSES JOHNSON, III, also know as
Thomas M. Johnson, III,**

Petitioner/Cross-Claim Defendant/Appellant,
and

COLONY SURF, LTD. and COLONY SURF
ASSOCIATION OF APARTMENT OWNERS,
Respondents/Identified Defendant Doe Corporation 1
and Doe Entity 1/Appellees,

and

JOHN DOES 1-5; JANE DOES 1-5; DOE
CORPORATIONS 2-5; DOE GOVERNMENTAL
AGENCIES 1-5; DOE PARTNERSHIPS 1-5; and
DOE ENTITIES 2-5, Defendants,

and

JOHN DOES 6-20; JANE DOES 6-20; DOE
PARTNERSHIPS 6-20; DOE CORPORATIONS 6-20;
DOE "NON-PROFIT" CORPORATIONS 6-20; and
DOE GOVERNMENTAL UNITS 6-20, Defendants.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 07-1-1893)

ORDER ACCEPTING
APPLICATION FOR TRANSFER
(By: Moon, C.J., for the court¹)

Upon consideration of the application for transfer filed by petitioner/defendant/cross-claim defendant/appellant Thomas Moses Johnson, III (petitioner), the papers in support and in response, and the record,

¹ Considered by: Moon, C.J., Nakayama, Acoba, and Duffy, JJ., and Circuit Judge Michael A. Town, assigned by reason of vacancy.

IT IS HEREBY ORDERED that the application for transfer is accepted pursuant to HRS § 602-58(b)(1) (Supp. 2007). This case is transferred to the supreme court effective the date of this order.

IT IS FURTHER ORDERED that petitioner's request to stay the July 16, 2008 judgment of foreclosure in Civil No. 07-1-1893 is denied.

IT IS FINALLY ORDERED that petitioner's request to reset the briefing schedule in this case is denied.

DATED: Honolulu, Hawai'i, January 30, 2009.

FOR THE COURT:

/s/ Ronald T. Y. Moon

Chief Justice

E. Department of Defense Manpower Data Center Military Status Report

Department of Defense Manpower Data Center

DEC 26 2008 19:54:03



Military Status Report
Pursuant to the Servicemembers Civil Relief Act

Last Name	First/Middle	Begin Date	Active Duty Status	Service/Agency
JOHNSON	THOMAS MOSES	AUG 15-2007	Active Duty	Army

Upon searching the information data banks of the Department of Defense Manpower Data Center, based on the information that you provided, the above is the current status of the individual as to all branches of the Military.

Mary M. Snavely-Dixon

Mary M. Snavely-Dixon, Director
Department of Defense - Manpower Data Center
1600 Wilson Blvd., Suite 400
Arlington, VA 22209-2593

The Defense Manpower Data Center (DMDC) is an organization of the Department of Defense that maintains the Defense Enrollment and Eligibility Reporting System (DEERS) database which is the official source of data on eligibility for military medical care and other eligibility systems.

The Department of Defense strongly supports the enforcement of the Servicemembers Civil Relief Act [50 USC Appx. §§ 501 et seq] (SCRA) (formerly the Soldiers' and Sailors' Civil Relief Act of 1940). DMDC has issued hundreds of thousands of "does not possess any information indicating that the individual is currently on active duty" responses, and has experienced a small error rate. In the event the individual referenced above, or any family member, friend, or representative asserts in any manner that the individual is on active duty, or is otherwise entitled to the protections of the SCRA, you are strongly encouraged to obtain further verification of the person's active duty status by contacting that person's Military Service via the "defenselink.mil" URL provided below. If you have evidence the person is on active-duty and you fail to obtain this additional Military Service verification, provisions of the SCRA may be invoked against you.

If you obtain further information about the person (e.g., an SSN, improved accuracy of DOB, a middle name), you can submit your request again at this Web site and we will provide a new certificate for that query.

This response reflects current active duty status only. For historical information, please contact the Military Service SCRA points-of-contact.

See: <http://www.defenselink.mil/faq/pis/PC09SLDR.html>

WARNING: This certificate was provided based on a name and Social Security number (SSN) provided by the requester. Providing an erroneous name or SSN will cause an erroneous certificate to be provided.

Report ID: GZNHZMFMVV